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I. STATUS OF CLAIMS

Claims 1-50 were pending for examination at the time of the office action.

Claims 23 and 48 stand objected to because there should be a period at the end of the claim. *See* Office Action, p.4 (18 June, 2008).

Claims 10, 11, 14, 15, 35, 36, 39, and 40 stand rejected under 35 USC §112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. *See* Office Action, p.4 (18 June, 2008).

Claims 1-4, 9-15, 17-21, 26-29, 34-36, 39, 40, and 42-46 stand rejected under 35 USC §103(a) as being unpatentable over Miller in view of Jaeger et al. (U.S. Patent 6,345,028) *See* Office Action, p. 5 (18 June, 2008).

Claims 5-8 and 30-33 stand rejected under 35 USC §103(a) as being unpatentable over Miller in view of Jaeger as applied to claim 1 above, and further in view of Eyer (U.S. Patent 5,801,753) *See* Office Action, p. 11 (18 June, 2008).

Claims 16, 22-25, 41, and 47-50 stand rejected under 35 USC §103(a) as being unpatentable over Miller in view of Jaeger as applied to claim 1 above, and further in view of Cho (U.S. Patent 6,081,402) *See* Office Action, p. 13 (18 June, 2008).

Claims 1-50 remain pending for examination.

II. ISSUES TO BE REVIEWED

The issues in this response relate to whether the art of record establishes a *prima facie* case of anticipation of Applicant's Claims 1-50, and whether the art of record establishes a *prima facie* case of unpatentability of Applicant's Claims 1-50. For reasons set forth elsewhere herein, Applicant respectfully asserts that the art of record does not establish a *prima facie* case of anticipation or unpatentability of any pending claim. Accordingly, Applicant respectfully requests that Examiner hold all pending Claims 1-50 allowable for at least the reasons described herein, and issue a Notice of Allowance on same.

III. ARGUMENT: ART OF RECORD DOES NOT ESTABLISH *PRIMA FACIE* CASE OF UNPATENTABILITY IN VIEW OF CITED ART OF RECORD

Applicant respectfully asserts herein that, under the MPEP and legal standards for patentability as set forth below, the art of record does not establish a *prima facie* case of the unpatentability of Applicant's claims at issue. Specifically, Applicant respectfully shows below that the art of record does not recite the text of Applicant's claims at issue, and hence fails to establish a *prima facie* case of unpatentability. Accordingly, Applicant respectfully requests that the Examiner withdraw the rejections and hold all claims to be allowable over the art of record.

A. MPEP Standards for Patentability¹

The MPEP states as follows: "the examiner bears the initial burden, on review of the prior art or on any other ground, of presenting a *prima facie* case of unpatentability. If that burden is met, the burden of coming forward with evidence or argument shifts to the applicant. . . . If examination at the initial stage does not produce a *prima facie* case of unpatentability, then without more the applicant is entitled to grant of the patent." MPEP § 2107 (citing *In re Oetiker*, 977 F.2d 1443, 1450, 24 U.S.P.Q.2d 1443, 1444 (Fed. Cir. 1992)); *In Re Glaug*, 283 F.3d 1335, 62 USPQ2d 1151 (Fed. Cir. 2002) ("During patent examination the PTO bears the initial burden of presenting a *prima facie* case of unpatentability. *In re Oetiker*, 977 F.2d 1443, 1450, 24 U.S.P.Q.2d 1443, 1444 (Fed. Cir. 1992); *In re Piasecki*, 750 F.2d 1468, 1472, 252 U.S.P.Q. 785, 788 (Fed. Cir. 1984). If the PTO fails to meet this burden, then the applicant is entitled to the patent."). Accordingly, unless and until an examiner presents evidence establishing *prima facie* unpatentability, an applicant is entitled to a patent on all claims presented for examination.

¹ Applicant is aware that Examiner is familiar with the MPEP standards. Applicant is merely setting forth the MPEP standards to serve as a framework for Applicant's arguments following and to ensure a complete written record is established. Should Examiner disagree with Applicant's characterization of the MPEP standards, Applicant respectfully requests correction.

1. MPEP Standards for Determining Anticipation

An examiner bears the initial burden of factually supporting any *prima facie* conclusion of anticipation. *Ex Parte Skinner*, 2 U.S.P.Q.2d 1788, 1788-89 (B.P.A.I. 1986); *In Re King*, 801 F.2d 1324, 521 U.S.P.Q. (BNA) 136 (Fed. Cir. 1986); *MPEP* § 2107 (citing *In re Oetiker*, 977 F.2d 1443, 1450, 24 U.S.P.Q.2d 1443, 1444 (Fed. Cir. 1992) (“[T]he examiner bears the initial burden, on review of the prior art or on any other ground, of presenting a *prima facie* case of unpatentability....”). Failure of an examiner to meet this burden entitles an applicant to a patent. *Id.* (“[i]f examination at the initial stage does not produce a *prima facie* case of unpatentability, then without more the applicant is entitled to grant of the patent”).

The MPEP indicates that in order for an examiner to establish a *prima facie* case of anticipation of an applicant’s claim, the examiner must first interpret the claim,² and thereafter show that the cited prior art discloses the same elements, in the same arrangement, as the elements of the claim which the examiner asserts is anticipated. More specifically, the MPEP states that “[a] claim is anticipated *only if each and every element as set forth in the claim is found*, either expressly or inherently described, in a single prior art reference. . . . The identical invention must be shown in as complete detail as is contained in the . . . claim. . . . The elements must be arranged as required by the claim . . .” *MPEP* § 2131 (emphasis added). Consequently, under the guidelines of the MPEP set forth above, if there is *any* substantial difference between the prior art cited by an examiner and an applicant’s claim which the examiner asserts is rendered anticipated by the prior art, the prior art does NOT establish a *prima facie* case of anticipation and, barring other rejections, the applicant is entitled to a patent on such claim.

² With respect to interpreting a claim at issue, the MPEP directs that, during examination -- as opposed to subsequent to issue -- such claim be interpreted as broadly as the claim terms would reasonably allow, in light of the specification, when read by one skilled in the art with which the claimed invention is most closely connected. *MPEP* § 2111.

2. MPEP Standards for Determining Obviousness

"[T]he examiner bears the initial burden of factually supporting any *prima facie* conclusion of obviousness."³ *MPEP* § 2142. The MPEP indicates that in order for an examiner to establish a *prima facie* case that an invention, as defined by a claim at issue, is obvious, the examiner must (1) interpret the claim at issue; (2) define one or more prior art reference components relevant to the claim at issue; (3) ascertain the differences between the one or more prior art reference components and the elements of the claim at issue; and (4) adduce objective evidence which establishes, under a preponderance of the evidence standard, a teaching to modify the teachings of the prior art reference components such that the prior art reference components can be used to construct a device substantially equivalent to the claim at issue. This last step generally encompasses two sub-steps: (1) adducement of objective evidence teaching how to modify the prior art components to achieve the individual elements of the claim at issue; and (2) adducement of objective evidence teaching how to combine the modified individual components such that the claim at issue, as a whole, is achieved. *MPEP* § 2141; *MPEP* § 2143. Each of these forgoing elements is further defined within the MPEP. *Id.*

This requirement has been explained recently by the Supreme Court in *KSR v. Teleflex*, 550 U.S. ____; 127 S. Ct. 1727 (2007) which noted that such a rejection requires "some articulated reasoning ... to support the legal conclusion of obviousness." As stated by the Court, obviousness can be established where "there was an apparent reason to combine the known elements in the fashion claimed by the patent at issue. To facilitate review, **this analysis should be made explicit.**" (*emphasis added*) See In re Kahn, 441 F. 3d 977, 988 (CA Fed. 2006) ('[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.')."*KSR v. Teleflex*, 550 U.S. ____; 127 S. Ct. 1727 at 1741.

³ An invention, as embodied in the claims, is rendered obvious if an examiner concludes that although the claimed invention is not identically disclosed or described in a reference, the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. *MPEP* § 2141 (citing 35 U.S.C. § 103).

As further described by the Court "*[A] patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art.* Although common sense directs one to look with care at a patent application that claims as innovation the combination of two known devices according to their established functions, it can be important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does. This is so because inventions in most, if not all, instances rely upon building blocks long since uncovered, and claimed discoveries almost of necessity will be combinations of what, in some sense, is already known." *KSR v. Teleflex*, 550 U.S. ____; 127 S. Ct. 1727 at 1741.

a) Interpreting a Claim at Issue

With respect to interpreting a claim at issue, the MPEP directs that, during examination -- as opposed to subsequent to issue -- such claim be interpreted as broadly as the claim terms would reasonably allow when read by one skilled in the art with which the claimed invention is most closely connected. In practice, this is achieved by giving each of the terms in the claim the "plain meaning" of the terms as such would be understood by those having ordinary skill in the art, and if portions of the claim have no "plain meaning" within the art, or are ambiguous as used in a claim, then the examiner is to consult the specification for clarification. *MPEP* § 2111.

b) Definition of One or More Prior Art Reference Components Relevant to the Claim at Issue

Once the claim at issue has been properly interpreted, the next step is the definition of one or more prior art reference components (*e.g.*, electrical, mechanical, or other components set forth in a prior art reference) relevant to the properly interpreted claim at issue. With respect to the definition of one or more prior art reference components relevant to the claim at issue, the MPEP defines three proper sources of such prior art reference components, with the further requirement that each such source must have been extant at the time of invention to be considered relevant. These three sources

are as follows: patents as defined by 35 U.S.C. §102, printed publications as defined by 35 U.S.C. §102, and information (e.g., scientific principles) deemed to be "well known in the art"⁴ as defined under 35 U.S.C. §102. *MPEP* § 2141; *MPEP* § 2144.

c) Ascertainment of Differences between Prior Art Reference Components and Claim at Issue; Teaching to Modify and/or Combine Prior Art Reference Components to Remedy Those Differences in Order to Achieve Recitations of Claim at Issue

With one or more prior art components so defined and drawn from the proper prior art sources, the differences between the one or more prior art reference components and the elements of the claim at issue are to be ascertained. Thereafter, in order to establish a case of *prima facie* obviousness, an examiner must set forth a rationale, supported by objective evidence⁵ sufficient to demonstrate under a preponderance of the evidence standard, that in the prior art extant at the time of invention there was a teaching to modify and/or combine the one or more prior art reference components to construct a device practicably equivalent to the claim at issue.

The preferable evidence relied upon is an express teaching to modify/combine within the properly defined objectively verifiable sources of prior art. In the absence of such express teaching, an examiner may attempt to establish a rationale to support a finding of such teaching reasoned from, or based upon, express teachings taken from the defined proper sources of such evidence (*i.e.*, properly defined objectively verifiable

⁴ The fact that information deemed to be "well known in the art" can serve as a proper source of prior art reference components seems to open the door to subjectivity, but such is not the case. As a remedy to this potential problem, *MPEP* § 2144.03 states that if an examiner asserts that his position is derived from and/or is supported by a teaching or suggestion that is alleged to have been "well known in the art," and that if an applicant traverses such an assertion (that something was "well known within the art"), the examiner must cite a reference in support of his or her position. The same *MPEP* section also states that when a rejection is based on facts within the personal knowledge of an examiner, the data should be stated as specifically as possible, and the facts must be supported, when called for by the applicant, by an affidavit from the examiner. Such an affidavit is subject to contradiction or explanation by the affidavits of the applicant and other persons. *Id.* Thus, all sources of prior art reference components must be objectively verifiable.

⁵ The proper sources of the objective evidence supporting the rationale are the defined proper sources of prior art reference components, discussed above, with the addition of factually similar legal precedent. *MPEP* § 2144.

sources of prior art). *MPEP* § 2144; *In re Dembiczak*, 50 U.S.P.Q.2d 1614 (Fed. Cir. 1999).

The MPEP recognizes the pitfalls associated with the tendency to subconsciously use impermissible "hindsight" when an examiner attempts to establish such a rationale. The MPEP has set forth at least two rules to ensure against the likelihood of such impermissible use of hindsight. The first rule is that:

under 35 U.S.C. 103, the examiner must step backward in time and into the shoes worn by the hypothetical "person of ordinary skill in the art" when the invention was unknown and just before it was made. In view of all factual information,⁶ the examiner must then make a determination whether the claimed invention "as a whole" would have been obvious at that time to that person. Knowledge of an Applicant's disclosure must be put aside in reaching this determination, yet kept in mind in order to determine the "differences," conduct the search, and evaluate the "subject matter as a whole" of the invention. The tendency to resort to "hindsight" based upon an Applicant's disclosure is often difficult to avoid due to the very nature of the examination process. However, impermissible hindsight must be avoided and the legal conclusion must be reached on the basis of the facts gleaned from the prior art.

MPEP § 2142 (emphasis added). Thus, if the only objective evidence of such teaching to modify and/or combine prior art reference components is an applicant's disclosure, no evidence of such teaching exists.⁷

The second rule is that if an examiner attempts to rely on some advantage or expected beneficial result that would have been produced by a modification and/or combination of the prior art reference components as evidence to support a rationale to establish such teachings to modify and/or combine prior art reference components, the MPEP requires that such advantage or expected beneficial result be objectively verifiable teachings present in the acceptable sources of prior art (or drawn from a convincing line

⁶ "Factual information" is information actually existing or occurring, as distinguished from mere supposition or opinion. *Black's Law Dictionary* 532 (5th ed. 1979).

⁷ An applicant may argue that an examiner's conclusion of obviousness is based on improper hindsight reasoning. However, "[a]ny judgment on obviousness is in a sense necessarily a reconstruction based on hindsight reasoning, but so long as it takes into account only knowledge which was within the level of ordinary skill in the art at the time the claimed invention was made and does not include knowledge gleaned only from applicant's disclosure, such a reconstruction is proper." *MPEP* § 2145(X)(A) (emphasis added).

of reasoning based on objectively verifiable established scientific principles or teachings). *MPEP* § 2144. Thus, as a guide to avoid the use of impermissible hindsight, these rules from the MPEP make clear that absent some objective evidence, sufficient to persuade under a preponderance of the evidence standard, no teaching of such modification and/or combination exists.⁸

B. Technical Material Cited by Examiner Miller (U.S. Patent 5,920,701) and Jaeger (U.S. Patent 6,345,0238) Does Not Show or Suggest the Text of Independent Claim 1 as Presented Herein; Notice of Allowance of Same Respectfully Requested

1. Independent Claim 1

Independent Claim 1 recites:

1. A method comprising:
publishing a schedule of content transmission, *the schedule identifying the content by one or more times*;

⁸ *In Re Sang Su Lee* 277 F.3d 1338 (Fed. Cir. 2002) (“When patentability turns on the question of obviousness, the search for and analysis of the prior art includes evidence relevant to the finding of whether there is a teaching, motivation, or suggestion to select and combine the references relied on as evidence of obviousness.”) *See, e.g., McGinley v. Franklin Sports, Inc.*, 262 F.3d 1339, 1351-52, 60 U.S.P.Q.2d 1001, 1008 (Fed. Cir. 2001) (“the central question is whether there is reason to combine [the] references,” a question of fact drawing on the *Graham* factors). “The factual inquiry whether to combine references must be thorough and searching.” *Id.* It must be based on objective evidence of record. This precedent has been reinforced in myriad decisions, and cannot be dispensed with. *See, e.g., Brown & Williamson Tobacco Corp. v. Philip Morris Inc.*, 229 F.3d 1120, 1124-25, 56 U.S.P.Q.2d 1456, 1459 (Fed. Cir. 2000) (“a showing of a suggestion, teaching, or motivation to combine the prior art references is an ‘essential component of an obviousness holding’”) (quoting *C.R. Bard, Inc., v. M3 Systems, Inc.*, 157 F.3d 1340, 1352, 48 U.S.P.Q.2d 1225, 1522 (Fed. Cir. 1998)); *In re Dembiczak*, 175 F.3d 994, 999, 50 U.S.P.Q.2d 1614, 1617 (Fed. Cir. 1999) (“Our case law makes clear that the best defense against the subtle but powerful attraction of a hindsight-based obviousness analysis is rigorous application of the requirement for a showing of the teaching or motivation to combine prior art references.”); *In re Dance*, 160 F.3d 1339, 1343, 48 U.S.P.Q.2d 1635, 1637 (Fed. Cir. 1998) (there must be some motivation, suggestion, or teaching of the desirability of making the specific combination that was made by the applicant); *In re Fine*, 837 F.2d 1071, 1075, 5 U.S.P.Q.2d 1596, 1600 (Fed. Cir. 1988) (“‘teachings of references can be combined only if there is some suggestion or incentive to do so.’”) (emphasis in original) (quoting *ACS Hosp. Sys., Inc. v. Montefiore Hosp.*, 732 F.2d 1572, 1577, 221 U.S.P.Q. 929, 933 (Fed. Cir. 1984)). The need for specificity pervades this authority. *See, e.g., In re Kotzab*, 217 F.3d 1365, 1371, 55 U.S.P.Q.2d 1313, 1317 (Fed. Cir. 2000) (“particular findings must be made as to the reason the skilled artisan, with no knowledge of the claimed invention, would have selected these components for combination in the manner claimed”); *In re Rouffet*, 149 F.3d 1350, 1359, 47 U.S.P.Q.2d 1453, 1457-58 (Fed. Cir. 1998) (“even when the level of skill in the art is high, the Board must identify specifically the principle, known to one of ordinary skill, that suggests the claimed combination. In other words, the Board must explain the reasons one of ordinary skill in the art would have been motivated to select the references and to combine them to render the claimed invention obvious.”)).

reading at least one content from at least one spatial data storage system in a fashion independent of the schedule of content transmission; and

transmitting the at least one content to a temporal data storage system in accord with the published schedule. (Emphasis added.)

As shown in the following, the technical material cited by the Examiner does not show or suggest the text of Claim 1. Accordingly, Applicant respectfully requests that Examiner allow Independent Claim 1.

a) Technical Material Cited by Examiner Does Not Show or Suggest the Text of at Least Independent Claim 1.

1. A method comprising:

[a] publishing a schedule of content transmission, *the schedule identifying the content by one or more times*;

[b] reading at least one content from at least one spatial data storage system in a fashion independent of the schedule of content transmission; and

[c] transmitting the at least one content to a temporal data storage system in accord with the published schedule.

With respect to Claim 1, Examiner has stated,

“As per claim 1, Miller discloses a method comprising:

publishing a schedule of content transmission, the schedule identifying the content by one or more times (col. 3, lines 1-2, col. 13, lines 4-9; Fig. 3, element 114)....”

See Examiner’s Office Action, p. 5 (June 18, 2008).

(1) Examiner Citations With Regard to Clause [a] of Independent Claim 1

Applicant respectfully points out that Applicant has reviewed the portions of Miller and Jaeger identified by Examiner, and so far as Applicant can discern, Miller

and Jaeger do not recite the text of clause [a] of Applicant's Independent Claim 1. Rather, the portions of Miller and Jaeger cited by Examiner recite as follows:

The distribution schedules that can be accommodated are then transmitted to certain of the requesting content sources.
See *Miller* (col. 3, lines 1-2).

In this step, the scheduler 10 distributes transmission instructions to the content sources 12, 14. These instructions include the time to start transmitting the content data to the replicated servers 16, 18, 20, the transfer rate, typically in bits/second, the overage factor, and the multicast address assigned.
See *Miller* (col. 13, lines 4-9).

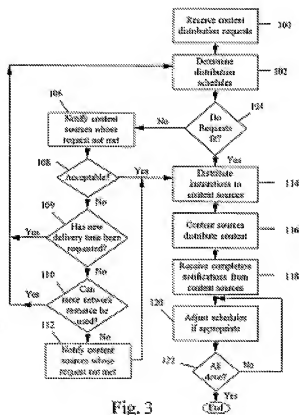


Fig. 3

See *Miller* (Fig. 3).

As can be seen from the foregoing, the Examiner-identified portions of Miller and Jaeger do not recite the text of clause [a] as recited in Independent Claim 1. For example, Miller recites “In this step, the scheduler 10 distributes transmission instructions to the content sources 12, 14. These instructions include the time to start transmitting the content data to the replicated servers 16, 18, 20, the transfer rate, typically in bits/second, the overage factor, and the multicast address assigned.” (Miller, col. 13, lines 4-9.) On the other hand, clause [a] recites “publishing a schedule of content transmission, *the schedule identifying the content by one or more times.*” The cited text does not show or recite “*the schedule identifying the content by one or more times.*”

Applicant has reviewed the Examiner-cited portions of Miller and Jaeger and is unable to locate a recitation of clause [a] of Claim 1. Applicant further respectfully points out that the Examiner has provided no objectively verifiable evidence, or argument based on objectively verifiable evidence, as to why the text of the reference passages should be interpreted to teach clause [a] of amended Independent Claim 1.

Given that Applicant has shown, above, what Miller and Jaeger actually recites, the question thus naturally arises as to how Examiner saw Miller and Jaeger as “teaching” something related to clause [a] of Independent Claim 1. Applicant respectfully points out that the Applicant’s Application is the only objectively verifiable examiner-cited document of record that shows or suggests what Examiner purports the reference to teach. From this and the express recitations of Miller and Jaeger as set forth, it follows that Examiner is interpreting Miller and Jaeger through the lens of Applicant’s application, which is impermissible hindsight use. Thus, at present, Examiner’s assertions regarding Miller and Jaeger are untenable. Under the MPEP guidelines as set forth above, the cited art of record fails to establish a prima facie case of unpatentability for at least these reasons. Accordingly, for at least the foregoing reasons, Applicant respectfully requests that Examiner hold Independent Claim 1 allowable and issue a Notice of Allowability of same.

In the alternative and/or in addition to the foregoing, as Examiner has provided no objectively verifiable evidence, nor argument based on objectively verifiable evidence, in support of Examiner assertions regarding what the technical material cited by Examiner “teaches,” Applicant infers that the Examiner is relying on “personal knowledge” and/or

is taking "official notice" of one or more factors to reach the factual conclusion of what the cited technical material "teaches." In view of the foregoing, if Examiner desires to maintain the rejection, in the next communication, Applicant respectfully requests that the Examiner provide an affidavit or declaration setting forth objectively verifiable evidence in support of Examiner's currently unsupported assertions regarding what the cited technical material "teaches" and/or should be interpreted to "teach." See, e.g., MPEP §2144.03(C), *If Applicant Challenges a Factual Assertion as Not Properly Officially Noticed or Not Properly Based Upon Common Knowledge, the Examiner Must Support the Finding with Adequate Evidence*, and 37 C.F.R. 1.104(d)(2).

In view of the foregoing, and under the MPEP standards as set forth above, Applicant respectfully submits that the Examiner-cited art does not establish a *prima facie* case of unpatentability of Independent Claim 1. Accordingly, for at least the foregoing reasons, Applicant respectfully asks Examiner to hold Independent Claim 1 allowable and to issue a Notice of Allowance of same.

2. Dependent Claims 2-25: Patentable for at Least Reasons of Dependency from Independent Claim 1.

Claims 2-25 depend either directly or indirectly from Independent Claim 1. "A claim in dependent form shall be construed to incorporate by reference all the limitations of the claim to which it refers." See 35 U.S.C. §112 paragraph 4. Consequently, Dependent Claims 2-25 are patentable for at least the reasons why Independent Claim 1 is patentable. Accordingly, Applicant respectfully requests that Examiner hold Dependent Claims 2-25 patentable for at least the foregoing reasons, and issue a Notice of Allowance on same.

C. Technical Material Cited by Examiner Miller (U.S. Patent 5,920,701) and Jaeger (U.S. Patent 6,345,0238) Does Not Show or Suggest the Text of Independent Claim 26 as Presented Herein; Notice of Allowance of Same Respectfully Requested

1. Independent Claim 26

Independent Claim 26 recites:

1. A system comprising:
 - means for publishing a schedule of content transmission, *the schedule identifying the content by one or more times*;
 - means for reading at least one content from at least one spatial data storage system in a fashion independent of the schedule of content transmission; and
 - means for transmitting the at least one content to a temporal data storage system in accord with the published schedule. (Emphasis added.)

As shown in the following, the technical material cited by the Examiner does not show or suggest the text of Claim 26. Accordingly, Applicant respectfully requests that Examiner allow Independent Claim 26.

a) Technical Material Cited by Examiner Does Not Show or Suggest the Text of at Least Independent Claim 26.

26. A system comprising:
 - [a] means for publishing a schedule of content transmission, *the schedule identifying the content by one or more times*;
 - [b] means for reading at least one content from at least one spatial data storage system in a fashion independent of the schedule of content transmission; and
 - [c] means for transmitting the at least one content to a temporal data storage system in accord with the published schedule.

With respect to Claim 26, Examiner has stated,

“As per claims 26 ..., these system claims correspond to method claims 1 ... and are therefore rejected under the same rationale as provided above.”

See Examiner's *Office Action*, p. 11 (June 18, 2008).

(1) Examiner Citations With Regard to Clause [a] of Independent Claim 26

Applicant respectfully points out that Applicant has reviewed the portions of Miller and Jaeger identified by Examiner, and so far as Applicant can discern, Miller and Jaeger do not recite the text of clause [a] of Applicant's Independent Claim 26. Rather, the portions of Miller and Jaeger cited by Examiner recite as follows:

The distribution schedules that can be accommodated are then transmitted to certain of the requesting content sources.
See *Miller* (col. 3, lines 1-2).

In this step, the scheduler 10 distributes transmission instructions to the content sources 12, 14. These instructions include the time to start transmitting the content data to the replicated servers 16, 18, 20, the transfer rate, typically in bits/second, the overage factor, and the multicast address assigned.
See *Miller* (col. 13, lines 4-9).

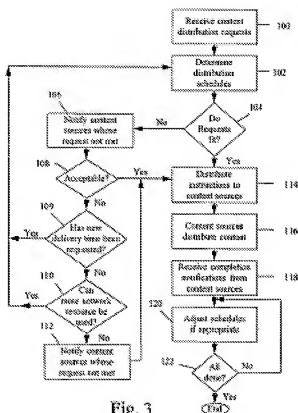


Fig. 3

See *Miller* (Fig. 3).

As can be seen from the foregoing, the Examiner-identified portions of *Miller* and *Jaeger* do *not recite* the text of clause [a] as recited in Independent Claim 26. For example, *Miller* recites “In this step, the scheduler 10 distributes transmission instructions to the content sources 12, 14. These instructions include the time to start transmitting the content data to the replicated servers 16, 18, 20, the transfer rate, typically in bits/second, the overage factor, and the multicast address assigned.” (*Miller*, col. 13, lines 4-9.) On the other hand, clause [a] recites “publishing a schedule of content transmission, *the schedule identifying the content by one or more times.*” The cited text does not show or recite “*the schedule identifying the content by one or more times.*”

Applicant has reviewed the Examiner-cited portions of Miller and Jaeger and is unable to locate a recitation of clause [a] of Claim 26. Applicant further respectfully points out that the Examiner has provided no objectively verifiable evidence, or argument based on objectively verifiable evidence, as to why the text of the reference passages should be interpreted to teach clause [a] of amended Independent Claim 26.

Given that Applicant has shown, above, what Miller and Jaeger actually recites, the question thus naturally arises as to how Examiner saw Miller and Jaeger as “teaching” something related to clause [a] of Independent Claim 26. Applicant respectfully points out that the Applicant’s Application is the only objectively verifiable examiner-cited document of record that shows or suggests what Examiner purports the reference to teach. From this and the express recitations of Miller and Jaeger as set forth, it follows that Examiner is interpreting Miller and Jaeger through the lens of Applicant’s application, which is impermissible hindsight use. Thus, at present, Examiner’s assertions regarding Miller and Jaeger are untenable. Under the MPEP guidelines as set forth above, the cited art of record fails to establish a prima facie case of unpatentability for at least these reasons. Accordingly, for at least the foregoing reasons, Applicant respectfully requests that Examiner hold Independent Claim 26 allowable and issue a Notice of Allowability of same.

In the alternative and/or in addition to the foregoing, as Examiner has provided no objectively verifiable evidence, nor argument based on objectively verifiable evidence, in support of Examiner assertions regarding what the technical material cited by Examiner “teaches,” Applicant infers that the Examiner is relying on “personal knowledge” and/or is taking “official notice” of one or more factors to reach the factual conclusion of what the cited technical material “teaches.” In view of the foregoing, if Examiner desires to maintain the rejection, in the next communication, Applicant respectfully requests that the Examiner provide an affidavit or declaration setting forth objectively verifiable evidence in support of Examiner’s currently unsupported assertions regarding what the cited technical material “teaches” and/or should be interpreted to “teach.” See, e.g., MPEP §2144.03(C), *If Applicant Challenges a Factual Assertion as Not Properly Officially Noticed or Not Properly Based Upon Common Knowledge, the Examiner Must Support the Finding with Adequate Evidence*, and 37 C.F.R. 1.104(d)(2).

In view of the foregoing, and under the MPEP standards as set forth above, Applicant respectfully submits that the Examiner-cited art does not establish a *prima facie* case of unpatentability of Independent Claim 26. Accordingly, for at least the foregoing reasons, Applicant respectfully asks Examiner to hold Independent Claim 26 allowable and to issue a Notice of Allowance of same.

2. Dependent Claims 27-50: Patentable for at Least Reasons of Dependency from Independent Claim 26.

Claims 27-50 depend either directly or indirectly from Independent Claim 26. "A claim in dependent form shall be construed to incorporate by reference all the limitations of the claim to which it refers." *See* 35 U.S.C. §112 paragraph 4. Consequently, Dependent Claims 27-50 are patentable for at least the reasons why Independent Claim 26 is patentable. Accordingly, Applicant respectfully requests that Examiner hold Dependent Claims 27-50 patentable for at least the foregoing reasons, and issue a Notice of Allowance on same.

IV. REJECTION ARGUMENT: THE OFFICE ACTION ERRED IN REJECTING CLAIMS 10, 11, 14, 15, 35, 36, 35, AND 40 UNDER 35 U.S.C. § 112, SECOND PARAGRAPH

The Examiner rejected claims 10, 11, 14, 15, 35, 36, 39, and 40 under 35 USC §112, second paragraph as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. *See* Examiner's Office Action, p. 4 (June 18, 2008).

Specifically the Office action states "As per claims 10, 11, 35, and 36, the term 'substantially complete' is a relative term which renders the claim indefinite." Applicant has amended claims 10, 11, 35, and 36 by removing "substantially complete." Therefore, Applicant requests withdrawal of the rejections and reconsideration and allowance of claims 10, 11, 35, and 36.

The Office action also states "As per claims 14, 15, 39, and 40, the term 'practically minimized' is a relative term which renders the claim indefinite." Applicant

has amended claims 14, 15, 39, and 40 by replacing “practicably” with “substantially.” Therefore, Applicant requests withdrawal of the rejections and reconsideration and allowance of claims 14, 15, 39, and 40.

V. OBJECTION TO THE ABSTRACT OF THE DISCLOSURE

The Examiner objected to the abstract because it is not descriptive. *See* Examiner’s Office Action, p. 3 (June 18, 2008). Applicant has amended the Abstract to correct the informalities noted by the Examiner. Applicant points out that he is doing such under protest, and hereby gives public notice that the amended abstract should in no wise be interpreted as definitive or limiting of any claim; applicant is amending as a courtesy to examiner only in order to advance prosecution rather than stalling the present application for this issue. Accordingly, Applicant respectfully requests reconsideration and withdrawal of these objections.

VI. OBJECTION TO THE CLAIMS

The Examiner objected to claims 23 and 48 because there should be a period at the end of the claims. *See* Examiner’s Office Action, p. 4 (June 18, 2008). Applicant has amended the claims to correct the informalities noted by the Examiner. Further, Applicant has amended claims 41-46 and 50 to correct other informalities. Accordingly, Applicant respectfully requests reconsideration and withdrawal of these objections.

VII. CONCLUSION

Applicant may have during the course of prosecution cancelled and/or amended one or more claims. Applicant notes that any such cancellations and/or amendments will have transpired (i) prior to issuance and (ii) in the context of the rules that govern claim interpretation during prosecution before the United States Patent and Trademark Office (USPTO). Applicant notes that the rules that govern claim interpretation during prosecution form a radically different context than the rules that govern claim interpretation subsequent to a patent issuing. Accordingly, Applicant respectfully submits that any cancellations and/or amendments during the course of prosecution should be

held to be tangential to and/or unrelated to patentability in the event that such cancellations and/or amendments are viewed in a post-issuance context under post-issuance claim interpretation rules.

Insofar as that the Applicant may have during the course of prosecution cancelled/amended/argued claims sufficient to obtain a Notice of Allowability of all claims pending, Applicant may not have during the course of prosecution explicitly addressed all rejections and/or statements in Examiner's Office Actions. The fact that rejections and/or statements may not be explicitly addressed during the course of prosecution should NOT be taken as an admission of any sort, and Applicant hereby reserves any and all rights to contest such rejections and/or statements at a later time. Specifically, no waiver (legal, factual, or otherwise), implicit or explicit, is hereby intended (e.g., with respect to any facts of which Examiner took Official Notice, and/or for which Examiner has supplied no objective showing, Applicant hereby contests those facts and requests express documentary proof of such facts at such time at which such facts may become relevant). For example, although not expressly set forth during the course of prosecution, Applicant continues to assert all points of (e.g. caused by, resulting from, responsive to, etc.) any previous Office Action, and no waiver (legal, factual, or otherwise), implicit or explicit, is hereby intended. Specifically, insofar as that Applicant does not consider the cancelled/unamended claims to be unpatentable, Applicant hereby gives notice that it may intend to file and/or has filed a continuing application in order prosecute such cancelled/unamended claims.

With respect to any cancelled claims, such cancelled claims were and continue to be a part of the original and/or present patent application(s). Applicant hereby reserves all rights to present any cancelled claim or claims for examination at a later time in this or another application. Applicant hereby gives public notice that any cancelled claims are still to be considered as present in all related patent application(s) (e.g. the original and/or present patent application) for all appropriate purposes (e.g., written description and/or enablement). Applicant does NOT intend to dedicate the subject matter of any cancelled claims to the public.

The Examiner is invited to contact Dale Barr (360) 627-7147 or Dale R. Cook at (425) 467-2260 with any issues that may advance prosecution of the application on the merits.

Respectfully submitted,

____/Dale Cook/_____

Dale Cook

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